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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 631

BUILDERS CORPORATION OF AMERICA

AND

HERLONG SIERRA HOMES, INC., *Petitioners;*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, dated and entered August 7, 1963.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 320 F. 2d 425.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 7, 1963. The jurisdiction of of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

Was the Court below correct in holding that acts of government subordinates on the operational level, whether negligent or not, cannot be actionable if such acts are executing a policy adopted in the exercise of an immune discretion? (Federal Tort Claims Act (28 U.S.C. § 1346(b), 2671-2680)).

Is the holding of the Court below that immunity arising from discretion at the policy level applies all the way down the line in conflict with *Indian Towing Co.* v. *U. S.*, 350 U.S. 15?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2674 provides pertinently:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

28 U.S.C. § 2680 provides pertinently:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> "(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

STATEMENT OF THE CASE

The Sierra Ordnance Depot, a military installation for the storage, shipment and destruction of explosives, is necessarily located in a desolate and isolated area of Northeast California.

Housing for the employees at the Depot was furnished by the Government. Such housing, as early as 1947, was determined to be inadequate and, as such, impeded the effective operation of the Depot.

Due to the inadequacy of housing, the Commanding Officer of the Depot, after negotiations between the Department of Defense, Federal Housing Administration (FHA), and Housing and Home Finance Agency (HHFA), pursuant to the National Housing Act of 1934 (12 U.S.C. § 1702), and the Act of August 8, 1949 (12 U.S.C. § 1748 et seq.),[1] requested construction of some 456 dwelling units to house civilian and military personnel employed at the Depot. This request was approved by the Commanding General, Sixth Army, the Superior of the Depot Commanding Officer, and by FHA.

The Department of Defense on October 24, 1951, certified to FHA that 125 units were necessary to provide adequate rental housing for the civilian and military personnel at the Depot. Immediately thereafter, the Depot Commanding Officer renewed his request for an additional 300 units which was denied by reason of prior policy precluding a supplemental certification until the initial project is 25% or more completed. Early in 1952, however, following designation of the

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[1] These statutes require that private enterprise undertake the construction, rental and operation of such housing.

Depot as a critical defense housing area, the construction of an additional 150 dwelling units was authorized.

Pursuant to statutory authority, FHA agreed to insure a mortgage on the 125 units certified on October 24, 1951, in the amount of $1,113,700, and petitioner, Herlong Sierra Homes, Inc. (Herlong), filed application, received approval, and undertook the construction of said units, having obtained a loan in said sum secured by a mortgage on the dwelling units and the personal property and fixtures therein. These units, authorized under Title VIII of the National Housing Act (the "Wherry Act"), were ready for occupancy in late 1953 in accordance with specifications issued and approved by the Department of the Army and FHA, which agencies were to also establish rent charges for the units. The monthly cost to Herlong to carry this project was about $9,000.

Petitioner, Builders Corporation of America (Builders), in accordance with specifications issued and approved by the Department of the Army and FHA, undertook construction of the 150 units authorized in 1952 pursuant to a commitment from FHA to insure a mortgage of $1,261,300 on said units. The mortgage on such units, built under authority of Title IX of the National Housing Act, was purchased by Federal National Mortgage Association. These units, commenced only after the Title VIII units were substantially completed, were ready for occupancy in July 1954. The monthly cost to Builders to carry this project was about $8,000.

In order for the units constructed by petitioners to have met their costs, it had been determined that 91% occupancy would be required. Recognizing his re-

sponsibility under Army Regulations,[2] the Commanding General of the Sixth Army adopted a policy designed to encourage the maximum occupancy of the units; in implementation of such policy, Commanding General, Sixth Army, directed his subordinate, Commanding Officer of the Depot, to take certain specified action to insure the requisite occupany.[3]

Petitioners contended below that the Commanding Officer's negligence in carrying out such directives resulted in continued vacancies in the Title VIII units thus causing Herlong to default in its mortgage payments and a foreclosure ensued. Few of the Title IX units were ever occupied, resulting in 1955 in a notice of default, sale and acquisition of the units by the United States.

ARGUMENT

Essentially, the appellate court held that if governmental action be predicated on discretion, the United States is immune from liability both at the decision level and thereafter on the operational level for the acts, negligent or not, of its subordinate officials charged with the task of carrying out the decision.

This interpretation of the "discretionary function exception" to the Federal Tort Claims Act is entirely

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[2] Paragraph 11b of AR 210-220 states in part that ". . . the Army, in initially certifying to the FHA the need for this housing, has assumed a definite moral obligation and has keen self-interest in all housing projects to assure that all units are occupied within the allowed occupancy factor for the individual projects. Accordingly, it will be the direct responsibility of the installation commander to provide the mortgagor with a coordinated and aggressive program to assure maximum occupancy."

[3] Appendix B, C and D.

at odds with the construction placed thereon by this Court. Beginning with the dissent in *Dalehite* v. *U. S.*, 346 U.S. 15, 47 (1953), and subsequently through the majority opinion in *Indian Towing Co.* v. *U.S.* 350 U.S. 61 (1955), this Court carefully carved out the limitations on the applicability of this important exception to the liability of the United States.

Congress in enacting the Tort Claims Act intended to breach the wall of sovereign immunity and provide a means of compensating the victims of negligence in the conduct of governmental activities. Recognizing this inescapable fact, the minority in *Dalehite* realized that the too literal reading of the discretionary function exception by the majority was defeating the whole purpose of the Act.

Justice Jackson, speaking for the three dissenters, cogently points out that where discretion is involved,

> "We do not predicate liability on any decision taken at 'Cabinet level' or on any other high-altitude thinking. Of course, it is not a tort for government to govern, and the decision to aid foreign agriculture by making and delivering fertilizer is no actionable wrong." 346 U.S. 57.

But the Justices quickly note that governmental immunity arising from discretion does not inexorably persist.

> "The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that *all the way down the line* there is immunity for every balancing of care against cost, of safety against production, of warning against silence." 346 U.S. 58. Emphasis added.

The philosophy of the minority in *Dalehite* was espoused by the majority in *Indian Towing Co.* v. *U. S.* The Court recognized that the discretionary function exception while protecting the United States in the formulation of policy may fail the Government on the operational level through the carelessness or negligence of its employees in executing orders implementing policy. The Court said:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." 350 U.S. 69.

Erroneously relying on the principle of immunity "all the way down the line" the Court below held that the facts of this case could not impose liability on the government.

As in the "Coast Guard" situation above, the Commanding General Sixth Army was exercising discretion in adopting a policy to ensure the occupancy of petitioners' units. However, once the Commanding General exercised his discretion to direct his subordinate in charge of detail, such subordinate was obligated to use due care in the carrying out of his su-

perior's directives.[4] Petitioners contend that the Depot Commanding Officer failed therein, thereby causing damage to them, giving rise to liability on the part of the United States under the Federal Tort Claims Act.

In reaching its holding that immunity arising from exercise of the discretionary function protects the government at all levels of activity, decision-making and operational, the Court of Appeals relied exclusively on *Dalehite*, and ignored the subsequent decision of this court in *Indian Towing Co.* The latter case evolved as the applicable law the position of the minority in *Dalehite*, namely, that liability *can* arise for the negligent performance on the operational level of directives which proceed from the exercise of immune discretion at a higher level. In fact, in *Indian Towing Co.*, this court notes that the government "does not deny that the Federal Tort Claims Act does provide for liability in some situations on the 'operational level' of its activity". 350 U.S. 64.

The purported recitation by the Court of Appeals of "the applicable law" that the Federal Tort Claims Act "did not create new causes of action where none existed before, nor did it foist novel and unprecedented liabilities upon the federal government," was specifically rejected by this Court in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957):

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[4] It has been maintained by petitioners throughout this litigation that each of the three "directives", dated January 23, 1954, April 28, 1954, and July 10, 1954, respectively, were "orders". The District Court classified only the July 10, 1954, "directive" as an "order". The Court of Appeals, in view of its disposition of the case, did not reach the question of whether any of the "directives" were "orders". These "directives" are set out in full as Appendix B, C and D hereto.

> "It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

Likewise erroneous under decisions of this Court was the characterization of "the applicable law" by the court below that "Acts of a governmental nature were never intended to be within the scope of the liability created." There *can* be "recovery based on the negligent performance of the activity itself, the so-called 'end objective' of the particular governmental activity." (*Indian Towing Co.*, p. 66). "[A]ll Government activity is inescapably 'uniquely governmental' in that it is performed by the Government." (*Indian Towing Co.*, p. 67).

> "[I]t is hard to think of any governmental activity on the 'operational level', our present concern, which is 'uniquely governmental', in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.
>
> "* * * The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import

immunity back into a statute designed to limit it." *Indian Towing Co.*, pp. 68-69.

> "The over-all impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of 'any governmental activity on the "operational level".' It seems broad enough to cover all so-called 'uniquely governmental activities'." *Indian Towing Co.*, p. 76. (Dissenting Opinion.)

In ignoring the dictates of *Indian Towing Co.*, the Court of Appeals' decision adheres to the rejected rule that the immunity arising from the discretionary functions protects the government all the way down the line. Thus the Court below finds that whether or not the Depot Commanding Officer, the officer on the operational level, was negligent in following orders carrying out the policy of his superior is immaterial. In so holding, the court below erred. Petitioners are entitled to have a judicial inquiry by the Court of Appeals into the question of whether the governmental activity on the operational level was or was not negligently performed.

In the interests of the administration of justice, it is incumbent upon this Court to correct the mistaken impression left by the decision below to the effect that immunity growing out of discretion never ends. The Federal Courts are entitled to know when and under what circumstances discretion ends and liability begins.

CONCLUSION

The action of the Court of Appeals in barring petitioners' claims by virtue of the "discretionary function or duty" exception to the Federal Tort Claims Act was erroneous. For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

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November 4, 1963

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,315

Aug. 7, 1963

BUILDERS CORPORATION OF AMERICA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California
Northern Division

Before: CHAMBERS, BARNES, and KOELSCH, *Circuit Judges*

BARNES, *Circuit Judge*:

Chapter 171 of Title 28, United States Code, and specifically Section 2674 thereof, provides in material part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."

Section 2680(a) of Title 28, United States Code, provides certain exceptions to the liability created by the entire Chapter 171 of Title 28, United States Code. Section 2680 reads, in material part:

> "The provisions of this chapter . . . shall not apply to—
>
> (a) Any claim . . . based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

By virtue of the same section (2680), if such discretionary function or duty is involved, no jurisdiction exists in the federal courts under § 1346(b) of Title 28, United States Code, to hear this claim.[1]

The waiver of the sovereign right created by the statutes above mentioned, did not create new causes of action where none existed before; nor did it foist novel and unprecedented liabilities upon the federal government. *National Mfg. Co.* v. *United States*, 8 Cir., 1954, 210 F. 2d 263, certiorari denied, 347 U.S. 967.

The rule of liberality of construction, in favor of the exceptions, applies. *Mid-Central Fish Co.* v. *United States*, W.D. Mo. 1953, 112 F. Supp. 792, 8 Cir. 1954, 210 F. 2d 263, certiorari denied, 347 U.S. 967.

The exceptions are not to be nullified through judicial interpretations, since Congress clearly delineated the areas in which it did not intend to forfeit its immunity from suit. *Toledo* v. *United States*, D. Puerto Rico 1951, 95 F. Supp. 838; *Hernandez* v. *United States*, D. Hawaii 1953, 112 F. Supp. 369.

Acts of a governmental nature were never intended to be within the scope of the liability created. *Dalehite* v. *United States*, 1953, 346 U.S. 15, rehearings denied, 346

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[1] Section 1346(b) of Title 28, United States Code, reads:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government, while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

U.S. 841, 346 U.S. 880, 347 U.S. 924; *Wheeldon* v. *United States*, N.D. Cal. 1960, 184 F. Supp. 81.

With the applicable law in mind we turn to the case before us, and the specific facts involved. We find them adequately, fairly and accurately stated in the memorandum opinion of the district court. We use and adopt a large portion of such memorandum opinion in the margin.[2]

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[2] "This is an action to recover damages from the United States of America under the provisions of the Federal Tort Claims Act (Title 28 U.S.C. §§ 1346 (b) and 2671 *et seq.*). The gist of the complaint is that certain Government agents failed and refused to perform obligations which the Government had assumed by virtue of contracts and commitments of certain agencies, in connection with certain dwelling units constructed by plaintiffs adjacent to the Sierra Ordnance Depot, a military installation of the United States, near Herlong, California. The complaint is in two counts. The allegations are substantially the same in both counts, except that in Count I, the defendant (the Government, through its agents and employees) is charged with wilful conduct, whereas in Count II, the defendant is charged with negligent conduct. Trial has been had on the issues raised by plaintiffs, and the Court is now called upon to resolve those issues.

The Sierra Ordnance Depot is located in a desolate and isolated area in the northeastern part of California. Prior to any of the activities which resulted in this action, a housing shortage existed at the Depot, which allegedly, threatened to impede the effective operation of the Depot. Because of this shortage, negotiations were carried on between the Department of Defense, Federal Housing Administration (FHA), and Housing and Home Finance Agency (HHFA, also a Federal agency) to obtain construction of some 456 dwelling units to house civilian and military personnel employed at the Depot. These units had originally been requested by the Commanding Officer of the Depot, and the request had been approved by the Headquarters of the Sixth Army (his superiors) and by FHA. These negotiations were carried on pursuant to the authority of the National Housing Act of 1934 (Title 12 U.S.C. § 1702), and of the Act of August 8, 1949 (Title 12 U.S.C. § 1748 *et seq.*), which required that the investment risks in such projects be undertaken by private enterprise.

The negotiations culminated in the issuance by the Defense Department, on October 24, 1951, of a certification to FHA that 125

The district court then considered the three communications between the Commanding General of the Sixth Army and the Commanding Officer of the Depot, dated January

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units were necessary to provide adequate rental housing for Depot personnel (both civilian and military); that the Depot was deemed a permanent installation; and that there was no present intention to substantially curtail activities at the Depot. The Depot Commanding Officer immediately repeated his request for an additional 300 units, based on prior study which had indicated that there were some 500 employees eligible for such housing. This request was denied, on the basis of Defense Department policy precluding a supplemental certification until the initial project was 25% or more completed. Since the need for housing was urgent and immediate, however, an additional 150 units were subsequently programmed by HHFA.

Thereafter, pursuant to statutory authority, FHA agreed to insure a mortgage on the original 125 units, in the amount of $1,113,700. Plaintiff Herlong Sierra Homes, Inc. (hereinafter Herlong) filed application, received approval, and undertook the construction of the original 125 units. A mortgage loan was secured from Manufacturers Trust Company of New York, refinanced by Manhattan Savings Bank of New York, and secured by a mortgage on the dwelling units to be constructed by Herlong. These units were authorized under Title VIII of the National Housing Act (the "Wherry Act"), and were completed and ready for occupancy in January, 1954 (having been completed in late 1953). Construction of these units was in accordance with specifications issued and approved by the Department of the Army and FHA, and Herlong agreed to reserve the completed units for rent to the personnel of the Depot (although apparently there was nobody else around in the area anyway). Rents were to be established by the Defense Department and FHA. During the period from June, 1954, to June, 1955, monthly costs in connection with the Title VIII units amounted to approximately $9,000.

Plaintiff, Builders Corporation of America, (hereinafter Builders) pursuant to a commitment from FHA to insure a mortgage of $1,261,300 for the 150 dwelling units programmed by HHFA, undertook construction of those units, also in accordance with specifications issued and approved by the Defense Department and FHA. Builders acquired a mortgage loan from California Bank of Los Angeles, secured by mortgages on each of the dwelling units. These mortgages were purchased by Federal National Mort-

13, 1954, April 28, 1954 and July 10, 1954, respectively (each in evidence herein as Plaintiff's Exhibits Nos. 19, 21 and 30).[3] The trial judge ruled the first two letters contained no direct or specific orders and were merely state-

gage Association. The units themselves were built under the authority of Title IX of the National Housing Act. They were not started, however, until the Title VIII units were substantially completed, and were not completed until late in 1954. Starting in July 1954, monthly payments on these units approximated some $8,000.

Probably the most important factor to plaintiffs in this program was the necessity that the projected units receive maximum occupancy. From a preliminary study, it was determined that 91% occupancy would be required in order for the units to meet their costs. In furtherance of this objective, a definite policy was set forth on the part of the Government, to encourage the maximum occupancy which would be required. Particularly was this policy enunciated on the part of the Government, in view of the fact that the Government had almost complete control of the sites, architecture, engineering, specifications, and inspections.

The Title VIII units were completed in late 1953, but at that time very few of the personnel at the Depot moved into the new units. This appears to have been an indication that the anticipated necessity for the Title IX units had been gauged over-optimistically. In any event, certain communications followed, from the Commanding General of the Sixth Army to the Commanding Officer of the Depot, Colonel Leavitt. It is upon these communications that plaintiffs base their claims. The precise nature of the communications is in dispute between the parties. This is the crucial issue to the case.

The basis of plaintiffs' claims is that they relied upon the communications (which they term "orders") by expending additional monies in housing construction, which they would not otherwise have done. With such a basis for their claims, it is obvious that there could have been, as plaintiffs themselves admit, no liability before those communications. The theory of plaintiffs' claims is that, by the communications, the Government voluntarily assumed a duty, and that reasonable care was required in its discharge.".

[3] Other letters containing similar language were sent to the Regional Director of the Housing and Home Finance Agency. Some were admitted in evidence; others refused admission.

ments of existing and future policy. We agree. The third letter the trial judge ruled was an order which directed certain things to be done, but which did not go so far as to order eviction of anyone from their then present housing. We need not pass on whether or not the July 10, 1954 letter was an order, in view of our disposition of other defenses. The trial judge ruled all the suggestions and orders had been followed and complied with by the officers so directed to act—that there was no "failure; either wilful or negligent, of government agents [specifically Colonel Leavitt and his staff] to carry out orders"—that all such orders so given were complied with.

We do not meet the question of what orders were given, or whether they were complied with. They all required Colonel Leavitt, in the chain of command he was then holding, to exercise some discretion. He was required by the position he held, for example, to notify his superior officer of the fourteen alleged deficiencies in the construction, as such deficiencies had been reported to him by those whom he was encouraging to use the housing accommodations. (Plaintiff's Ex. 25.) He was required, in his discretion, to determine whether certain key employees had to be available for telephone calls—day or night—and hence should not use the accommodations offered.

In *Dalehite* v. *United States*, *supra*, the Army's Chief of Ordnance was delegated to carry out the plan of producing a Fertilizer Grade Ammonium Nitrate (FGAN) by plants originally built in the United States to manufacture ammonium nitrate for explosives. The plants were operated by private companies, but under the supervision of the military. Army personnel were appointed for each camp. Negligence of all responsible for the production of FGAN was charged, resulting from the explosion of the French steamship, Grandcamp—with the leveling of the town of Texas City, and the death of thousands. The trial court found in favor of the plaintiffs, the court of appeals re-

versed, and that latter judgment was affirmed. The Supreme Court held the findings did not establish a case, and "that as a matter of law the facts found cannot give the District Court jurisdiction of the cause under the Tort Claims Act."[4]

We come to the same conclusion with respect to the matter now before us, for the same reasons set forth in *Dalehite* v. *United States*, *supra*, pp. 27-45.

Once the discretionary function is established as applicable to the facts—

> "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion." *Dalehite* v. *United States*, *supra*, pp. 35-36.

The Commanding General here, in whatever he requested or ordered, was exercising his discretion in attempting to encourage a policy of full and maximum use of the housing facilities available. We think Colonel Leavitt exercised his best judgment in what he did and how he did it. But whether he did or not, whether he was negligent or not; whether he abused *his* discretion, are all immaterial. The sovereign immunity of the United States

[4] 346 U.S. 15, at 24.

does not permit awards for damages arising out of acts performed by reason of the discretionary duty or function of "an employee of the government."[5]

The judgment in favor of the United States is *affirmed.*

(Endorsed) Opinion Filed Aug. 7, 1963.

FRANK H. SCHMID, *Clerk.*

APPENDIX B

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23 January 1954

AMENG-CPD 620/1516

Subject: Status of Wherry Housing Project

To: Commanding Officer
Sierra Ordnance Depot
Herlong, California

1. It has been called to the attention of this headquarters informally that the Wherry Housing Project at Sierra Ordnance Depot is not being occupied by personnel of the installation as the houses are completed. Specifically, this headquarters was advised that of the 30 houses available for occupancy, only 5 are tenanted.

2. Under AR 210-220 dated 8 May 1952 or predecessor directives, the installation commander is responsible for the initiation and development of the project and this headquarters is responsible for the review and analysis of the project request.

3. Paragraph 11b of AR 210-220 states in part that ". . . the army, in initially certifying to the FHA the need for this housing, has assumed a definite moral obligation and has keen self-interest in all housing projects to assure that all units are occupied within the allowed occupancy

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[5] *Cf.* 28 U.S.C. § 2680(a), *supra.*

factor for the individual project. Accordingly, it will be the direct responsibility of the installation commander to provide the mortgagor with a coordinated and aggressive program to assure maximum occupancy."

4. Attention is invited to letter, AGAO-C 600.12 (5 Oct. 50) G4, DA, TAG, 9 October 1950, subject: "Title VIII, NHA Housing Project—Sierra Ordnance Depot, California," copies of which are attached as Inclosure 1, wherein the Department of the Army sets for the certain premises to the approval of the 125 unit project. In paragraph 3 thereof it states in effect that the project required the eventual disposition of an equal amount of existing substandard housing.

5. It is desired that this headquarters be advised of the status of Wherry Housing at Sierra Ordnance Depot, the aggressive program adopted to assure maximum occupancy and other comment relating to this project.

For the Commanding General:

C. R. Alban
Capt. AGC
Asst Adj

1 Incl (dupe)
DA TAG Ltr 9 Oct. 50

Copy furnished:
Dist. Engr. SFran Dist CE US Army

APPENDIX C

AMENG-CPD 620/2006

Subject: Title VIII (Wherry) and Title IX Housing Projects, Sierra Ordnance Depot, Herlong, California.

To: Commanding Officer
Sierra Ordnance Depot
Herlong, California.

1. Reference is made to the Wherry Housing Conference held at Sierra Ordnance Depot on 6 April 1954. This headquarters expects no major difficulty in obtaining occupancy of the Title VIII and IX housing projects at Sierra Ordnance Depot. This is based upon:

a. The information presented and the conclusions reached at the above conference.

b. The anticipated early occupancy of the Title IX housing.

c. The early completion of landscaping and dust control by the sponsor at both housing projects.

However, in order to accelerate full occupany of these housing projects and to present maximum opportunity to those not able to afford the rents in the housing projects, it is desired that an income limitation commensurate with the size of the family be established on those who may occupy Government quarters.

2. In the event the above action does not bring about the desired results, steps should be taken to demolish certain of the temporary housing units, as was initially agreed upon and considered when housing projects were authorized at Sierra Ordnance Depot. In this regard, it is recommended that action for destruction of these units not be initiated prior to 30-60 days after beneficial occupancy is

obtained in the Title IX housing project, in order to have sufficient time to determine the occupancy pattern.

3. Attention is invited to additional suggested actions and procedures in obtaining occupancy in Wherry Housing outlined in letter, AGAC-C (m) 600.12 (23 Apr. 53) G4, The Adjutant General, DA, 28 April 1953, subject: "Programming and Management of Housing Projects Constructed under Title VIII, FHA (Wherry Act)" with 1 inclosure.

For the Commanding General:

APPENDIX D

AMENG 1 620 2006 (28 Apr. 54) 2d Ind.

SUBJECT: Title VIII (Wherry) and Title IX Housing Projects, Sierra Ordnance Depot, Herlong, California.

HEADQUARTERS SIXTH ARMY, Presidio of San Francisco, California. 10 Jul 54

TO: Commanding Officer, Sierra Ordnance Depot, Herlong, California.

1. A conference was held in this headquarters on 30 June 1954, attended by representatives of Builders Corporation of America (the sponsors), the California Bank of Los Angeles (the funding agency), the Federal Housing Administration, The Housing and Home Finance Agency, the Great American Bond & Indemnity Corporation, the Sierra Ordnance Depot, the San Francisco District Engineer and this headquarters.

2. The conference was initiated by this headquarters due to:

a. The deficiencies enumerated in preceding 1st Indorsement which influenced the renting of the Wherry Project.

b. The evident proximity of the builder sponsor to a financial crisis leading to bankruptcy.

c. The "moral obligation" and "keen self-interest" of the several echelons of the Department of the Army as set forth in paragraph 11b of AR 210-220 which embraces Sierra Ordnance Depot and this headquarters.

d. The possibility of a Congressional investigation into the elements which have contributed to delay in the completion of the housing, and other factors which may have been instrumental in not obtaining 93% occupancy at this time.

e. The integrity of the Commanders of the Sixth Army and the Sierra Ordnance who have certified, during the inception of this project that there are personnel attached to the installation of sufficiently high civil service grade and salary to warrant support of this project.

3. It was determined that, with one exception, none of the deficiencies set forth in preceding 1st Indorsement exists as of the date of the meeting. Further, that many of the deficiencies were of such a nature as not to warrant consideration by the conference. In this connection, your attention is invited to the complaint of low water pressure and maladjustment of the lighter on the gas ranges. It was stated by representatives of Sierra Ordnance Depot that upon opening up additional valves in the water system, pressure became normal and satisfactory. It was stated by representatives of the contractors that adjustments to the gas ranges were made as soon as complaints were registered.

4. The Secretary of the Army approved this project for an average monthly shelter rental of $74.41, including taxes, but without the garage charge. The comparable average rental now in effect is $72.22. Therefore the average basic shelter rental was not found to have been increased but, to the contrary, is somewhat lower.

5. Records in this headquarters and discussion in the conference fail to show the authorization for the charge of $6.50 for a garage. The representatives of the FHA stated that, in accordance with existing regulations, additions which affect the rental rates are not authorized unless concurred in by the installation commander. Section II, paragraph 6h(7) of AR 210-220, states: "Requests for changes by the mortgagor in the construction contract must bear written approval of a responsible military office . . . prior to submission to the local insuring office of the Federal Housing Administration." It would appear, in the absence of evidence to the contrary, that Sierra Ordnance Depot concurred in the addition of a garage to each of the houses for a monthly charge of $6.50. This raises the average basic rent from $72.22 to $78.72 per month.

6. This headquarters does not approve of the amount being paid by the tenants for a garage, but, in view of the apparent earlier concurrence by the installation, it is difficult, if not impossible, at this time to establish the fact that the monthly charge appears to be unreasonable.

7. The cost of utilities is not considered as rent, although their cost is a factor in living expense. Generally the utility charges for on-post housing are substantially lower than for equal service off-post or in Wherry Housing Projects. In an effort to equalize the latter services, this headquarters has recommended oil fired furnaces for space heating and electricity for water heating kitchen ranges and lighting. The record shows that the Sierra Ordnance Depot sponsored electricity for space heating in lieu of an oil fired furnace. The report will further show that, had the latter recommendation been followed, the cost of space heating would have been beyond the ability of the tenants to pay. The record shows that Lt. Colonel Ward C. Howard, ORDC, attended a meeting in the Engineer Section of this headquarters on 8 December 1952, at which time the relative merits and costs of utility supply were

discussed. It was decided to use liquid petroleum gas from a distribution system for space heating. The then Commanding Officer of the Sierra Ordnance Depot concurred in this determination and so notified the San Francisco Engineer by telephone.

8. The installation of individual L. P. gas systems was not approved by this headquarters because of the higher monthly cost, and because of the unsightly tanks. An effort is being made to determine who authorized the individual systems. If this change was not authorized by your headquarters, it is desired that copies of all correspondence and minutes pertaining to this subject be furnished this headquarters. It is believed that, in time, the system may be shifted to a distribution type with consequent reduction in monthly gas bills.

9. It was pointed out that a number of persons, not employed by the Department of the Army but rendering service to the installation, are living on post at greatly reduced rental.

10. The Secretary of the Army made a statement in his Letter of 9 October 1950 that this project requires the eventual disposition of an equal amount of existing substandard housing. The data contained on pages 34 through 55 of the Sierra Ordnance Depot Building Index sheets, dated January 1954, indicates that the economy of maintenance of the buildings is uneconomical and that they are not recommended for retention. The minutes of the initial Wherry meeting at the installation, dated 8 July 1950, stated that there was agreement that the existing housing is inadequate, that the turnover of personnel is largely due to inadequate housing, that this condition contributes to certain morale and welfare problems, that overcrowding is the cause of respiratory disease increase, and that a visit of the conference members confirmed that the housing units were substandard.

11. In light of the foregoing, it is desired that the following action be taken by your headquarters prior to 30 July 1954:

a. Establish an income limitation (with a sliding scale for dependents) above which a person may not occupy the present Government quarters.

b. Serve notice on tenants of Government quarters whose income is above the salary limit established as directed in sub-paragraph a above, that their quarters must be vacated not later than 1 September 1954.

c. Serve notice on tenants of Government quarters who are not employed by the Department of the Army but who are rendering services to the installation that, unless there is some contract or operating agreement which guarantees these persons on-post housing, their quarters must be vacated not later than 1 September 1954.

d. Select a total of 25 sets of sub-standard family quarters for disposal, prepare the necessary WD AGO Form 357, and forward forms to this headquarters by separate correspondence for transmittal to the Department of the Army.

e. Serve notice on the tenants of the quarters selected for disposal that, subject to the approval by the Department of the Army, they will be required to vacate the quarters on a 30-day notice.

12. Military personnel shall not be included in the action desired by preceding paragraph 11. A copy of this Indorsement is being forwarded to the Chief of Ordnance.

For the Commanding General:

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,315

BUILDERS CORPORATION OF AMERICA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California Northern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

Filed and entered August 7, 1963.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 631

BUILDERS CORPORATION OF AMERICA, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the district court for judgment in favor of the United States is not reported. The opinion of the Court of Appeals for the Ninth Circuit (Pet. 1a-8a) is reported at 320 F. 2d 425.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1963. On November 5, 1963, by order

of the Chief Justice, the time for the filing of a petition for a writ of certiorari was extended to November 20, 1963. The petition was filed on November 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the allegedly negligent actions of the Commanding Officer of the Sierra Ordnance Depot in connection with efforts to obtain maximum occupancy of petitioners' housing projects are within the "discretionary function" exception of the Federal Tort Claims Act (28 U.S.C. 2680(a)).

2. Whether the communications from the Commanding General, Sixth Army Headquarters, to the Commanding Officer, Sierra Ordnance Depot, upon which petitioners rely, imposed a duty owing to petitioners.

STATUTE INVOLVED

Section 2680 of Title 28, United States Code, provides in pertinent part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * *

STATEMENT

Petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover damages for allegedly wilful and negligent conduct of the Commanding Officer of the Sierra Ordnance Depot in failing to carry out purported directives of his superior officer concerning a program to assure maximum occupancy of dwelling units constructed by petitioners adjacent to the depot.

In 1951 the Ordnance Depot, located in an isolated area in northeastern California, was suffering from a shortage of housing for its civilian and military personnel. Upon a request by the Commanding Officer of the Depot, federal officials engaged in negotiations concerning the construction of additional dwelling units pursuant to the authority of the National Housing Act of 1934, 12 U.S.C. 1702, and of the Act of August 8, 1949, 12 U.S.C. 1748, *et seq.*, which required that private enterprise undertake the construction, rental and operation (Pet. 3 and 3a, n. 2).

Initially, the Department of Defense certified to the Federal Housing Authority (FHA) the necessity for 125 units. Thereafter the construction of an additional 150 units was authorized. On each of the projects FHA agreed to insure the mortgage (Pet. 3a-4a, n. 2).

Petitioner Herlong Sierra Homes, Inc., constructed the original 125 units which were completed and ready for occupancy in January 1954. It cost Herlong $9,000 monthly to meet the mortgage and other charges on these units (Pet. 4a, n. 2). Petitioner

Builders Corporation of America constructed the additional 150 units which were completed in late 1954. Builders' monthly mortgage and other costs were approximately $8,000. (Pet. 4a-5a, n. 2). From a preliminary study it was determined that 91 percent occupancy would be required in order for the petitioners to meet their costs of operation. However when the first units were ready for occupancy in January 1954, few of the personnel at the depot moved in (Pet. 5a, n. 2).

Between January 13, 1954, and July 10, 1954, the Commanding General of the Sixth Army sent three communications to the Commanding Officer of the Depot with respect to occupancy of the units (Pet. 4a-5a). The first quoted the policy of the Department of the Army, as set forth in paragraph 11b of AR 210-220, stating (Pet. 8a-9a):

> * * * the army, in initially certifying to the FHA the need for this housing, has assumed a definite moral obligation and has keen self-interest in all housing projects to assure that all units are occupied within the allowed occupancy factor for the individual project. Accordingly, it will be the direct responsibility of the installation commander to provide the mortgagor with a coordinated and aggressive program to assure maximum occupancy.

The second communication stated that to accelerate full occupancy of the projects and to present maximum opportunity to those not able to afford the rents in the housing projects, it was desired that an income limitation be established as to persons permitted to

occupy government quarters; that if such action did not bring about the desired results, steps should be taken to demolish certain of the temporary housing units, but not until after beneficial occupancy of the second 150 units had been obtained (Pet. 10a-11a).

In the third communication, the Commanding General requested that the following actions be taken to promote increased occupancy of the units: The establishment of an income limitation as to those civilian employees who would be permitted to occupy government quarters; the service of notice on other civilian personnel for vacation of their government quarters by a specified date; the selection of twenty-five sets of substandard family quarters for disposal; and the service of notice on the occupants of such quarters that, subject to the approval of the Department of the Army, they would be required to move on 30-days' notice (Pet. 15a).

In this action under the Tort Claims Act, petitioners sought to recover for financial losses allegedly suffered because of the lack of sufficient occupancy of the new units (Pet. 5). Petitioners based their claim upon the three communications (which they termed "orders") between the Commanding General and the Commanding Officer of the Depot. Petitioners' theory was that "by the communications, the Government voluntarily assumed a duty, and that reasonable care was required in its discharge" (Pet. 5a, n. 2).

In affirming the judgment of the district court in favor of the government, the court of appeals stated (Pet. 5a-6a)—

> The trial judge ruled the first two letters contained no direct or specific orders and were merely statements of existing and future policy. We agree. The third letter the trial judge ruled was an order which directed certain things to be done, but which did not go so far as to order eviction of anyone from their then present housing. * * * The trial judge ruled all the suggestions and orders had been followed and complied with by the officers so directed to act—that there was no "failure, either wilful or negligent, of government agents [specifically Colonel Leavitt and his staff] to carry out orders"—that all such orders so given were complied with:[1]

The court of appeals, however, did not find it necessary to decide whether any orders given had been complied with. It held that the activities of the Commanding General of the Sixth Army and the Commanding Officer of the Depot in implementing the policy of the Army to assist the mortgagors in obtaining maximum occupancy of the projects were within the "discretionary function" exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a) (Pet. 6a-8a).

ARGUMENT

1. Petitioners argue (Pet. 8) that the court of appeals erred in holding that the discretionary function exception "protects the government at all levels of activity." The short answer to the contention is that

[1] Colonel Leavitt was the Commanding Officer of the Depot.

no attempt was made to give the exception such a broad reach. On the contrary, below the level of the Commanding General of the Sixth Army, about whom petitioners do not complain, the court considered only the actions of the Commanding Officer of the Depot who, it found, was required to exercise discretion in implementing the Army policy to assist mortgagors in obtaining maximum occupancy of the projects. Specifically, the court held that the Commanding General "in whatever he requested or ordered, was exercising his discretion in attempting to encourage a policy of full and maximum use of the housing facilities available" (Pet. 7a); that such requests or orders "all required Colonel Leavitt [the Commanding Officer of the Depot], in the chain of command he was then holding, to exercise some discretion" (Pet. 6a); and that the "discretionary function" exception precluded suit based on such activities.[2]

Thus, the decision stands for no more than that, on the facts of this case, the exception applies to government officers at the level of the Commanding Officer of the Depot. Looking to specific language in *Dalehite* v. *United States*, 346 U.S. 15, as quoted by the court below (Pet. 7a),[3] it seems plain that the decision is entirely correct.

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[2] The court was satisfied that the Commanding Officer of the Depot had exercised his best judgment in what he did and how he did it (Pet. 7a). The district court in turn had held that all of the suggestions and orders had been followed and complied with, so that there was no failure either wilful or negligent to carry out orders (Pet. 6a).

[3] "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do,

In urging that the court below erroneously applied the "discretionary function" exception to immunize the government from liability for actions of the Commanding Officer of the depot, petitioners rely upon *Indian Towing Company* v. *United States*, 350 U.S. 61 (Pet. 7-8). It is clear, however, that *Indian Towing* is inapplicable. There, the government conceded that the "discretionary function" exception in Section 2680(a) was not applicable to the negligent acts at issue. Accordingly, the Court's decision did not directly involve this exception or the circumstances in which it properly applies. See 350 U.S. at 64. Instead, *Indian Towing Company* was concerned with the so-called governmental function doctrine, *i.e.*, whether the Federal Tort Claims Act is applicable when the United States is engaging in "uniquely governmental" activity unrelated to any type of activity which might give rise to tort suits between private persons. The Court held that there was no broad "governmental function" exception to the Federal Tort Claims Act,

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that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion." 346 U.S. at 35-36.

and rejected any language in *Dalehite* which might be construed as indicating the contrary. On the other hand, the doctrine of *Dalehite* remained intact insofar as it relates to the "discretionary function" exclusion of Section 2680(a).[4]

2. In any event, these communications established no governmental duty running to petitioners upon which they could predicate an action under the Federal Torts Claims Act. One of the basic elements of actionable negligence is, of course, the existence of a legal duty running to the claimant. "The plaintiff must bring himself within the scope of a definite obligation, so that it might be regarded as personal to him." Prosser on *Torts*, § 31, p. 179.

Nowhere does it appear that the government assumed a definite obligation to petitioners to assure occupancy necessary to enable petitioners to carry the financial costs of the projects. On the contrary, it has been held that the certificate of need issued by the Army to the FHA made no representation, guaranty, or warranty of permanency or occupancy; that it was issued for the benefit of FHA and not for the benefit of the builder or operator; and that, conse-

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[4] In *Mahler* v. *United States*, 306 F. 2d 713, 723 (C.A. 3), certiorari denied, 371 U.S. 923, the court, quoting from the *Dalehite* opinion, pointed out: "Where there is room for policy judgment and decision there is discretion." The Third Circuit then continued: "Although there are portions of the *Dalehite* opinion which are no longer authoritative, we do not read * * * *Indian Towing Company* v. *United States* * * * as having retracted the language quoted." See also *United States* v. *Gregory*, 300 F. 2d 11, 13 (C.A. 10); *United States* v. *Hunsucker*, 314 F. 2d 98, 103-104 (C.A. 9).

quently, it could not be a basis of liability of the government to the operator of such a project who defaulted on his mortgage payments because the project was not occupied by the number of tenants originally determined to be necessary to insure profitable operation. *Henry Barracks Housing Corp.* v. *United States*, 281 F. 2d 196 (Ct. Cls.); see also *Deseret Apartments* v. *United States*, 250 F. 2d 457 (C.A. 10).

At best petitioners can point to no more than a policy to assist the mortgagor to obtain maximum occupancy, which policy rested only upon what the Army considered to be its "moral obligation" in certifying the need for housing to the FHA, and upon its own "self-interest" in the new housing projects. No basis exists for finding a legally enforceable duty to the private parties who constructed such units at their own financial risk. Whatever duty the Commanding Officer of the Depot had in initiating and carrying out a program for occupancy was owed solely to his superiors and not to petitioners. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-129. Absent the alleged legal duty, petitioners cannot recover under the Federal Tort Claims Act even if the government actions were not covered by the "discretionary function" exception. *Wooldridge Manufacturing Co.* v. *United States*, 235 F. 2d 513 (C.A.D.C.),

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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